No.46950-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

PERRY BLYE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Kevin D. Hull

REPLY BRIEF

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A. REPLY ARGUMENT

1. THE FRUITS OF THE WARRANT SHOULD HAVE BEEN EXCLUDED UNDER THEIN AND FRANKS.

a. Summary. The Respondent argues that the trial court did not err in denying Mr. Blye's Thein[1] motion to suppress the fruits of the search warrant for lack of probable cause, or in denying the defendant's Franks[2] motion regarding omissions and misstatements in the probable cause affidavit for the warrant. Response Brief, at pp. 3, 5.

However, regarding Thein, the issue is "nexus" to the house searched – a showing, adequate to warrant invasion of the Military Road house, that drug-seller McFarland was storing her drugs for sale at that location, where Perry Blye was arrested. The fact that a drug dealer is the owner or occupant at a home does not establish probable cause to search the house. United States v. Frazier, 423 F.3d 526, 532-33 (6th Cir. 2005); U.S. Const. amend. 14; Wash. Const. Art. 1, § 7.

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[1] State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) ("nexus" requirement of probable cause for warrant not satisfied by mere rote assertions that people who deliver drugs keep evidence of such activity in their residence).

[2] Franks v. Delaware, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (material omissions or misstatements in search warrant affidavit require suppression if reckless or intentional).

b. <u>There is no probable cause to search the Military Road house where the police never adequately observed the drug seller Ms. McFarland leaving that location, once she was telephoned by the informant/buyer, or returning to it without stopping elsewhere.</u> Ms. McFarland conducted two drug sales in locations geographically far-flung from the Military Road house. CP 53, 55 (warrant affidavit). The informant/buyer told police he telephoned McFarland seeking drugs, and said that she *lived* at the Military Road address, but McFarland was <u>not</u> observed by police leaving that house on either date– she was only first observed in her Jeep at the *deal location*. CP 53, 55 (warrant affidavit). This was despite Detective Whatley surveilling the house area before the first buy; for the second buy, no attempt was even made. CP 391, 395.

Since it could not be said that McFarland departed the Military Road house, it could not be said she "returned" to there. At most she simply went to that house after executing a deal from her vehicle, miles away. And, without continuous observation from the deal locations to the house, the idea that there is a reasonable inference that she brought drugs with her to that house, or had drugs there, is untenable.

In the first drug sale, McFarland was observed by police meeting up with the informant/buyer at their vehicles off Wheaton Way, but after

the apparent sale, McFarland drove to another location and stopped and met an unknown person. After the drug deal,

> Sgt. Plumb maintained surveillance of the suspect female [McFarland] who drove across the street to the parking lot of the K Mart where she met with a gold Chevy truck that was lifted. A heavy female got out of the passenger side of the truck and got into the Jeep with the suspect. There was a driver in the truck who could not be seen due to them wearing a large hooded sweatshirt that was white in color.

CP 54 (warrant affidavit). McFarland then drove away from this meeting, into the night. Notably, there is, thereafter, no affidavit information about subsequent conduct of this heavy person – whose insertion into the facts only adds to the problems of probable cause created by the failures to follow.

With the second drug deal, there was as noted no actual police observation of McFarland leaving from the Military Road address after the informant/buyer telephoned her; rather, police again first observed McFarland simply arrive at the deal location. CP 53, 55.

McFarland's unknown path from the locations of both far-flung drug deals, to the house on Military Road, was the primary focus of Mr. Blye's arguments under Franks.

c. *Franks* issues. The police reports at the Franks hearing revealed that the second drug purchase ("buy # 2") involved a significant

lack of continuous observation, which is contrary to statements in the warrant affidavit. The police reports' description of the second drug deal also revealed the first deal to be far less probative of any proposition that McFarland stored drugs at the Military Road house.

The Respondent criticizes Appellant's argument that the police reports show falsity of the statement in the warrant affidavit, that Ms. McFarland, with regard to buy # 2, was continuously observed driving from the remote drug delivery location to the house at Military Road, just as with buy # 1. Response Brief, at pp. 7-8; see CP 55 line 14 (warrant affidavit, page 8, stating that buy # 2 was conducted "in the same manner as buy # 1.").

Respondent notes that the description of buy # 1 was not stated in the affidavit to involve continuous observation after the sale; by that assertion, Respondent attempts to characterize the warrant affidavit as forthrightly stating that both buys did not involve continuous observation of Ms. McFarland, post-sale, from the delivery locations, to the Military road house. Response Brief, at p. 8.

However, the opposite is true – the erroneous description of the second buy as being similar to the first buy served to paint both buys – and both falsely – as involving *continuous surveillance.* After stating

that the second buy was conducted in the same manner as the first, the warrant affidavit then immediately thereafter states,

> SOG detectives assisting with the purchase on 2/21/13 were able to **follow McFarland back to the mobile house (#48) after Buy # 2, as was done after Buy # 1**.

(Emphasis added.) CP 55 (warrant affidavit, page 8, lines 16-19).

When the Franks materials are reviewed, they paint a very different picture. Detective Plumb's supplemental police report indicates that he was assigned the task of following McFarland during buy # 2. After the drug sale that seemed to occur on the basis that the informant and Ms. McFarland met near their cars, both Plumb and Detective Heffernan followed McFarland. However, they allowed her to turn on to Pine Road, and thereafter did not follow her. CP 398 (Detective Plumb police report, page 2).

After a wholly unspecified period of time passed, Detective Plumb then drove to the Military Road address. Plumb was notified that Detective Heffernan had spotted McFarland approaching Military Road, but McFarland in fact parked on NE Knights Court. Another five minutes elapsed, and then several minutes later, Plumb observed that McFarland had arrived at the mobile home address. CP 398 (Detective Plumb report, page 2).

The lack of continuous observation of McFarland results in these facts establishing nothing but an inadequate, *de minimis* nexus to the Military Road house.

Detective Plumb wrote in his report – admitted for the Franks hearing -- that allowing McFarland to go unobserved - i.e., not following her – was a police "counter surveillance" tactic used to ensure that a suspect does not believe she is being followed by law enforcement. That may well be -- but it has no pertinence to the lack of contribution to probable cause of that empty time. The trial court was in error when it considered this explanation – see CP 368 (State's response to motion to suppress) – as showing that McFarland was even more suspicious because she used a technique aimed at throwing police off her trail. CP 401. The State makes much of this reasoning by the trial court, arguing it shows the omitted information would actually bolster probable cause. Response Brief, at p. 9. This is completely erroneous. The fact that the drug dealer behaved surreptitiously as she drove around the area doing her sales does not add to any claim of "nexus" to the house as the drug storage location. The time Ms. McFarland went unobserved and unaccounted for at the inception of the drug deals, and after they were

conducted, is crucial in this case, which involves a warrant to enter a citizen's home – not an arrest warrant for McFarland.

The Respondent miscasts Mr. Blye's argument when it states that Appellant asserts there is a flaw in probable cause based on his speculation regarding what Ms. McFarland could have been doing or where she went during these significant, unobserved times. Response Brief, at p. 7. To the contrary, Mr. Blye merely points out, as he did below, that during various times, the police – because she went unobserved – had *no knowledge* of and *could not attest to* whether she stopped at other locations or not, or what she did when she did stop, for example, to meet the heavy woman from the gold truck. AOB, at p. 15. There was nothing legally erroneous when Mr. Blye's counsel noted below that the lack of continuous observation and McFarland's meeting with others presented the possibility, or even likelihood, that McFarland's supply of drugs for sale came from places and persons that had nothing to do with the Military Road house. CP 359 (defense memorandum of law). In the entirety of this case, the police made no observations that were inconsistent with McFarland meeting with her supplier at an unknown location before arriving at the drug deals, or depositing drugs or proceeds at places or with persons she contacted

after the deals. Her arrival at Military Road later did not connect her to storing drugs for sale in that house.

The better police procedure followed in other parts of this case demonstrates the ultimate lack of probable cause. The principle of continuous observation is the very reason that the police attempt to conduct, and document, continuous observation of an informant/buyer to ensure that the informant/buyer does not have drugs on their person before the controlled drug transaction occurs. See CP 53 (warrant affidavit); CP 391 (thorough search of informant before deal).

That happened in this case in order to allow an inference that the drugs the buyer later produced for police were indeed from Ms. McFarland, but it did not happen as to Ms. McFarland. The warrant-drafting detective's rote use of boilerplate paragraphs lengthily stating that drug dealers store their drugs at a house where they may reside, does not cure the lack of probable cause based on facts.

For that and the other reasons above, there is no reasonable inference that she stored drugs or evidence of drug dealing at the Military Road house.

d. *Franks* legal standard. Additionally, the State does not appear to respond to Mr. Armstrong's argument that the trial court erred

as a matter of law in analyzing this case under Franks. Response Brief, at pp. 8-9. The trial court applied the *wrong* legal standard when it stated that none of the errors, inaccuracies or omissions were done intentionally to conceal information from or deceive the magistrate. CP 400-02 (Finding III). That is not the test -- factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (a) material and (b) made deliberately *or in reckless disregard* for the truth. Franks v. Delaware, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); State v. Cord, 103 Wn.2d 361, 366–67, 693 P.2d 81 (1985); State v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981).

In fact, what the trial court deemed 'rushed or sloppy' drafting of a warrant affidavit by Detective Elton may indeed be reckless for Franks purposes. The Franks Supreme Court viewed the recklessness standard as being met by statements in the warrant made without regard for accuracy. Franks, 438 U.S. at 170-72. Some courts have deemed it to be reckless when an affiant writes statements in the presence of "obvious reasons to doubt the accuracy of the information he [or she] reported." United States v. Clapp, 46 F.3d 795, 801 n. 6 (8th Cir.1995). Under either standard, reckless inaccuracy and omission of important facts is

shown here. Again, one need only look to the detailed discussions in the warrant about how the officers searched the informant/buyer and searched his car, and kept him under continuous observation, to realize that these officers certainly also knew the importance of keeping track of the suspect seller, if a case was going to be made that a house should be invaded under the theory that it is a storehouse for drugs.

Probable cause was lacking in the warrant affidavit, and it was certainly lacking when considered with the material omissions under Franks; for all of the reasons argued herein and in the Opening Brief Mr. Blye asks this Court to reverse the order denying suppression and order dismissal of the charge.

2. WHERE THE EVIDENCE STRONGLY SHOWED MR. BLYE HAD PROXIMITY AND DOMINION AND CONTROL OVER THE PREMISES, BUT MS. MCFARLAND TESTIFIED THE DRUGS WERE HERS AS A DRUG DEALER, AN INSTRUCTION ON THE LESSER OFFENSE WAS REQUIRED BY EFFECTIVE COUNSEL.

Mr. Blye's counsel was ineffective in failing to seek a jury instruction on simple possession of a controlled substance, which is a lesser included crime within possession with intent to deliver. In this case, the trial evidence allowed a determination that Mr. Blye was only guilty of simple possession, because there was affirmative evidence from

which the jury could conclude that he committed the lesser included crime. State v. Fowler, 114 Wn. 2d 59, 67, 785 P.2d 808 (1990).

The defendant's argument was, essentially, that he was not dealing the drugs in question. The Respondent notes that Ms. McFarland testified that the drugs that were found lying around the house at Military Road were solely hers, that she obtained them, and that she had been cutting them up for distribution. Response brief, at pp. 16-17.

However, contrary to the State's characterization of closing argument, the defense contention was that Mr. Blye did not possess the drugs *with intent to deliver*. 10/23/14RP at 754-57, 771-73. Further, as the State also points out, the jury was instructed on constructive possession, as part of the charge of possession with intent to deliver. CP 471 (jury instruction 13, constructive possession). The evidence that Mr. Blye had adequate dominion and control over the premises and therefore the drugs shows that the essence of the defense was that Mr. Blye was not *dealing* drugs.

In these circumstance, he argues that the jury should have been instructed on simple possession and given the option to find Mr. Blye guilty solely of the lesser offense. Mr. Blye's judgment should be reversed.

B. CONCLUSION

Based on the foregoing and on the Opening Brief, this Court should reverse Mr. Blye's conviction and sentence.

Respectfully submitted this 13th day of November, 2015.

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	)	
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	)	
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